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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 995

WILLIAM H. WILSON AND ADRIANA WILSON,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the Tax Court (R. 10a–14a [1]) is not officially reported. The opinion of the court of appeals (Pet. 13) is reported at 311 F. 2d 228.

JURISDICTION

The judgment of the court of appeals was entered on January 9, 1963 (Pet. 14). The petition for a writ of certiorari was filed on April 6, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "R." and "Supp. R." refer, respectively, to the appendix to the taxpayers' and Commissioner's briefs in the court of appeals.

QUESTION PRESENTED

Whether the Tax Court lacked jurisdiction of taxpayers' petition for redetermination of their income tax liability for 1950 through 1954 because of failure to file the petition within the time prescribed in Section 272(a)(1) of the Internal Revenue Code of 1939 and Section 6213(a) of the Internal Revenue Code of 1954.

STATUTES INVOLVED

Sections 6212(a) and (b), 6213(a) and (c) of the Internal Revenue Code of 1954 are set forth in the Appendix, *infra*, p. 7–8.[2]

STATEMENT

On January 17, 1961, the Commissioner mailed, by certified mail, notices of deficiencies in income tax for the years 1950 through 1954 to the last known addresses of the taxpayers—one to their home address at 201 Bell Avenue, Hasbrouck Heights, New Jersey, and one to the office of the taxpayer-husband at 345 Boulevard in the same city. Although the notices were correctly addressed, they were not actually received by the taxpayers (R. 9a, 10a; Supp. R. 3a). An affidavit of the Post Office mail carrier shows that delivery was attempted at the husband-taxpayer's office but that, either because the taxpayer-husband's secretary would not sign for delivery or because the office was closed, he left a notice that the certified letter could be picked up at the local post office (R. 9a–10a).

[2] Section 272 (a)(1) and (k) of the Internal Revenue Code of 1939, applicable to the years 1950 through 1953, is substantially similar to Sections 6212 and 6213 of the Internal Revenue Code of 1954.

On August 4, 1961, the taxpayers mailed a petition for redetermination of the deficiencies to the Tax Court, which was filed on August 7, 1961, 202 days after the deficiency notices had been mailed. On September 29, 1961, the Commissioner filed a motion to dismiss the petition since it had not been filed within 90 days of the notices of deficiency as required by Section 272(a)(1) of the Internal Revenue Code of 1939 and Section 6213(a) of the Internal Revenue Code of 1954. On October 3, 1961, the Tax Court ordered the case dismissed for lack of jurisdiction unless the taxpayers filed written objections to the order by October 24, 1961. Written objections were filed and a hearing was held on the Commissioner's motion to dismiss. On January 2, 1962, the Tax Court ordered that its previous order of October 3, 1961, dismissing the case for lack of jurisdiction, be made absolute (R. 1a–14a). The court of appeals affirmed *per curiam* (Pet. 13).

ARGUMENT

1. The court below properly affirmed the Tax Court's dismissal for lack of jurisdiction of the taxpayers' petition for redetermination on the ground that the petition was not timely filed. Section 272(a)(1) of the Internal Revenue Code of 1939 and Section 6213(a) of the Internal Revenue Code of 1954, Appendix, *infra*, pp. 7–8, require that a petition for redetermination of a tax deficiency determined by the Commissioner be filed with the Tax Court within 90 days after the mailing of the notice of deficiency. It is undisputed that the Commissioner

mailed on January 17, 1961, two notices of deficiency properly addressed, and that the taxpayers' petition for redetermination was not filed until August 7, 1961, long after the 90-day period allowed by the statute (R. 1a, 10a; Supp. R. 3a).

The Tax Court is a tribunal of limited jurisdiction (*Commissioner* v. *Gooch Co.*, 320 U.S. 418), and the timely filing requirement is jurisdictional (*Bloch* v. *Commissioner*, 254 F. 2d 277 (C.A. 9); *Underwriters, Inc.* v. *Commissioner*, 215 F. 2d 953 (C.A. 3); *Mindell* v. *Commissioner*, 200 F. 2d 38 (C.A. 2); *Lewis-Hall Iron Works* v. *Blair*, 23 F. 2d 972 (C.A. D.C.), certiorari denied, 277 U.S. 592. Consequently, it is well established that an untimely petition must be dismissed. *Bloch* v. *Commissioner, supra; Jorgensen* v. *Commissioner*, 246 F. 2d 536 (C.A. 9); *Galvin* v. *Commissioner*, 239 F. 2d 166 (C.A. 2); *Firnhaber* v. *Nelson*, 209 F. Supp. 777 (E.D. Wis.); *Heaberlin* v. *Commissioner*, 34 T.C. 58.

2. Petitioner contends, however, that the two notices which were mailed to him but not delivered did not start the running of the 90-day period because actual notice is required. However, Section 6212(b)(1) of the 1954 Code provides that the mailing of notice to the taxpayer's last-known address is sufficient and Section 6213(a) states that the 90-day period runs from the time the notice is mailed. The Courts have followed this plain language and held that "actual receipt of the notice by the taxpayers is not required in order that the statutory filing period commence." *Boccuto* v. *Commissioner*, 277 F. 2d 549,

552 (C.A. 3); accord, *Pfeffer* v. *Commissioner*, 272 F. 2d 383 (C.A. 2).

Contrary to the taxpayers' contention (Pet. 7–10), there is no conflict of decisions. None of the cited cases hold that actual receipt of the deficiency notice is required by the statute. In *Tenzer* v. *Commissioner*, 285 F. 2d 956 (C.A. 9); *Eppler* v. *Commissioner*, 188 F. 2d 95 (C.A. 7); and *Boren* v. *Riddell*, 241 F. 2d 670 (C.A. 9), earlier registered mailings were held to have been abandoned by subsequent manual delivery or remailings. The issue in *Rosewood Hotel, Inc.* v. *Commissioner*, 275 F. 2d 786 (C.A. 9), was whether the notice of deficiency was correctly sent to the last-known address of the taxpayer, and the case was remanded to the Tax Court for a finding as to the taxpayer's last-known address. In *Commissioner* v. *Stewart*, 186 F. 2d 239 (C.A. 6), the Commissioner had failed to send a registered notice of deficiency which was correctly addressed, but since the taxpayer had received actual notice it was held that the purpose of the statute was accomplished so as to give the Tax Court jurisdiction. The court did not hold that actual notice is required in addition to compliance with the statutory method.

3. Taxpayers' contention (Pet. 10) that the Tax Court's interpretation of the statute would deprive the taxpayers of due process of law guaranteed by the Fifth Amendment is without merit. The Fifth Amendment guarantees no particular form of procedure; instead, it protects substantial rights. *Federal Communications Commission* v. *WJR*, 337 U.S. 265, 275; *National Labor Relations Board* v. *MacKay Co.*,

304 U.S. 333, 351; see *Cohen* v. *United States*, 297 F. 2d 760 (C.A. 9), certiorari denied, 369 U.S. 865. Since the taxpayers have the right to contest the validity of the tax by paying the deficiency, filing a claim for refund and, if that be denied, suing for a refund of the amount paid plus interest, they have not been denied the right to a hearing. Accordingly, the failure of the statute bestowing jurisdiction to require that a taxpayer be given actual notice of the deficiency prior to assessment—even assuming that said notice would otherwise be necessary—is not a denial of due process.

CONCLUSION

For the above-stated reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
LOUIS F. OBERDORFER,
Assistant Attorney General.
MEYER ROTHWACKS,
CAROLYN R. JUST,
Attorneys.

MAY 1963.

APPENDIX

Internal Revenue Code of 1954 (26 U.S.C.):[1]

SEC. 6212 [as amended by Sec. 89(b), Technical Amendments Act of 1958, P.L. 85-866, 72 Stat. 1606]. NOTICE OF DEFICIENCY.

(a) *In General.*—If the Secretary or his delegate determines that there is a deficiency in respect of any tax imposed by subtitles A or B, he is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail.

(b) *Address for Notice of Deficiency.*—

(1) *Income and gift taxes.*—In the absence of notice to the Secretary or his delegate under section 6903 of the existence of a fiduciary relationship, notice of a deficiency in respect of a tax imposed by chapter 1 or 12, if mailed to the taxpayer at his last known address, shall be sufficient for purposes of such chapter and this chapter even if such taxpayer is deceased, or is under a legal disability, or, in the case of a corporation, has terminated its existence.

* * * * *

SEC. 6213. RESTRICTIONS APPLICABLE TO DEFICIENCIES; PETITION TO TAX COURT.

(a) *Time for Filing Petition and Restriction on Assessment.*—Within 90 days, or 150 days if

[1] Section 272(a)(1) of the Internal Revenue Code of 1939 (as amended by Section 168(a) of the Revenue Act of 1942, 56 Stat. 798, and Sec. 203(a) of the Act of December 29, 1945, 59 Stat. 669), relating to the sending of the notice of deficiency by the Commissioner and the filing of a petition for redetermination with the Tax Court, and Section 272(k), relating to the address for the notice of deficiency, are applicable for the years 1950 through 1953. Insofar as this case is concerned, those sections are substantially the same as Sections 6212 and 6213 of the 1954 Code and, consequently, are not set forth.

the notice is addressed to a person outside the States of the Union and the District of Columbia, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in section 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A or B and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. * * *

* * * * *

(c) *Failure to File Petition.*—If the taxpayer does not file a petition with the Tax Court within the time prescribed in subsection (a), the deficiency, notice of which has been mailed to the taxpayer, shall be assessed, and shall be paid upon notice and demand from the Secretary or his delegate.

* * * * *

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